

**BOARD FOR GEOLOGISTS AND GEOPHYSICISTS**

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September 14, 1999

EDWIN F. LOWRY

Director

Department of Toxic Substances Control

400 P Street, 4th Floor

P.O. Box 806

Sacramento, CA 95814

Re: Review of Geologic Reports by Public Agencies

Dear Mr. Lowry:

Your letter of March 25, 1999, to Paul Sweeney, Executive Officer, State Board of Geologists and Geophysicists (hereinafter referred to as the "Board"), requesting the Board to provide an opinion in the above-referenced matter was referred to this office for a response. By way of introduction, my name is Gary Duke and I serve as Staff Counsel with the California Department of Consumer Affairs. I provide legal counsel to the Board.

Specifically, you raised the following question:

Question

Does the substantive review of geologic reports by officials employed by the Department of Toxic Substances Control ("DTSC") constitute the practice of geology for which registration is required?

Conclusion

Although the **preparation** of geologic reports, plans, or other documents are required to be conducted under the responsible charge of registered geologist, the **review** of these documents is not specifically required by statute to be conducted by a registered geologist. Consequently, it is not possible to state without substantial qualification or reservation that, as a matter of law, the substantive review of geologic reports involves the professional practice of geology requiring registration. Likewise, existing law does not specify which exact activities involved in geologic document review fall within the restricted practice of geology. Nevertheless, geologic work involving the exercise of discretion and judgment should be conducted under the responsible charge of a registered geologist. If the review of a geologic report includes functions or activities that are more than "ministerial," involves actual geologic decisions and culminates in the preparation of a "geologic report," such a review involves the "practice of geology for others." The preparation of such "geologic reports" must be conducted or supervised by a registered geologist.

This letter is intended to highlight those provisions of existing law providing guidance in determining those professional activities that may require registration as a geologist.

Background

According to your letter, the Department of Toxic Substances Control ("DTSC") reviews a variety of geological documents in overseeing the clean up of contaminated sites and in issuing permits to hazardous waste facilities. Many of DTSC regulations require the submission of documents and plans that are either prepared by a registered geologist or have a geological component. However, since no specific laws or regulations were cited in your letter detailing DTSC's function or responsibility in reviewing and approving geologic reports, it is difficult to address "geologic practice" issues without knowing the ultimate purpose of the document review and the use of any evaluation documents or reports produced as a result of the review.

The specific regulations and laws governing DTSC dictate the specific review process and the intended function and goal of reviewing geologic reports. A review of the policies of DTSC regarding the intended work product resulting from the substantive review of geologic reports would assist in determining the level of professional qualifications, including licensure, required of officials who conduct a substantive geologic review. In addition, it is our understanding that there may be various "levels" of review prior to "final acceptance" of a geologic report. Some types of review may be more substantive than other types of review.

Legislative Intent Regarding Practice of Geology by Public Officials

There is no other authority (i.e., statutes, regulation or case law) of which we are aware which squarely addresses the issue of legislative intent at hand regarding the practice of geology by persons employed in the public sector.¹ Nevertheless, section 1 of the enabling legislation establishing the Geologist and Geophysicist Act provides the following expression of general legislative intent in regulating the practice of geology:

1 The Act does not contain a provision parallel to the provision of the Professional Engineers Act (Bus. & Prof. Code § 67093.2) that explicitly specifies that the provisions of the Professional Engineers Act applicable to the private sector are also imposed on the public sector. However, it should also be noted that the language used in the Professional Engineers Act is unique. There is no such similar provision related to any of the other professions and occupations regulated under the Business and Professions Code despite the fact that the state recognizes that certain personnel classifications are restricted to certain licensed professionals (ie., attorneys). Historically, there may have been some confusion as to licensing requirements of engineers employed in the public sector due to the wide number of exemptions already present in law. For instance, there are a large number of engineers employed in the private sector but who are exempt from state registration requirements under the so-called "industrial exemption." (Bus. & Prof. Code § 6747.) In addition, prior to enactment of Business and Professions Code section 6730.2, engineers have long been employed in the public sector with varying levels of responsibility without the benefit of licensure. Section 6730.2 simply clarified the licensing requirements for those engineers employed in the public sector that are in responsible charge of engineering work.

"This chapter is enacted in order to introduce qualifying criteria in a presently unregulated professional field. Such action recommends itself through benefits to the safety, health, and property of the people of California and to the promotion of the public welfare. These benefits are in the fields of geology as related to engineering, ground water, mineral exploration and development, geologic hazards, the further development of the science of geology, and other geologic matters of concern to the people of the state." (Stats.1968, ch. 942.)

Also, in 1994 the State Senate approved Senate Concurrent Resolution 45. This measure requested the State Personnel Board and the Department of Personnel Administration to review the civil service classifications for engineering geologists to ensure that these positions are used in compliance with the Geologists and Geophysicist Act. (SCR 45 – 1994, attached) The legislature intended SCR 45 to show that the "certification requirements that are imposed upon the private professional engineering geologists and engineering geology partnerships, firms or corporations shall also be imposed upon the state." (Ibid.) The legislature also expressed the intention that any local governmental entity "engaged in the practice of hiring engineering geologists shall also adhere to those [licensing] requirements." (Ibid.) As only an expression of limited legislative intent, SCR 45 does not have the force or effect of law. Nevertheless, it does demonstrate that the legislature is concerned with the level professional practice of public officials engaged in geologic practice in the interest of the safety, health, and property of the people of California and to promote the public welfare.

State Licensure Scheme: Statutes

The laws governing the practice of geology are found in the Geologist and Geophysicist Act. (Bus. & Prof. Code § 7800 et seq., hereinafter referred to as the "Act.") Although the *preparation* of geologic reports, plans, or other documents are required to be conducted under the responsible charge of registered geologist, the *review* of these documents is not specifically required by statute to be conducted by a registered geologist. (Bus. & Prof. Code § 7835.2) Existing law does not specifically include a working definition of geologic document review or clearly specify which activities involved in geologic document review fall within the restricted practice of geology. Nevertheless, authority is provided in the Act to support the position that certain work or practice is restricted to registered geologists.

The statutory scheme provides guidance in determining the types of activities requiring registration, or more precisely, which types of geologic activities are required to be conducted under the responsible charge of a registered geologist. Although there are a limited number of exemptions from licensure in the Act³, Section 7832 specifies those persons who are subject to registration by the Board:

² All statutory references are to the Business and Professions Code unless stated otherwise.

³ Statutory exemptions include federal officers and employees (Bus. & Prof. Code § 7836) as well as registered civil and petroleum engineers (Bus. & Prof. Code § 7838).

"Any person, except as in this chapter specifically exempted, who shall practice or offer to practice geology or geophysics for others in this state is subject to the provisions of this chapter."

In relevant part, section 7802 defines "geology" as:

"... that science which treats of the earth in general; investigation of the earth's crust and the rocks and other materials which compose it; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for the benefit of mankind."

In addition, section 7830 restricts the use of the title "registered geologist":

"After June 30, 1970, it is unlawful for anyone other than a geologist registered under this chapter to stamp or seal any plans, specifications, plats, reports, or other documents with the seal or stamp of a registered geologist or registered certified specialty geologist, or to use in any manner the title "registered geologist" or the title of any registered certified specialty geologist unless registered, or registered and certified, hereunder." 4

The preparation, signing and sealing of geologic plans, specification and other documents are required to be performed by a registered geologist pursuant to Section 7835:

All geologic plans, specifications, reports or documents shall be prepared by a registered geologist, or registered certified specialty geologist, or by a subordinate employee under his direction. In addition, they shall be signed by such registered geologist, or registered certified specialty geologist or stamped with his seal, either of which shall indicate his responsibility for them.

The statutorily defined concept of "responsible charge of work" (§ 7805) is key to determining what activities involve the practice of geology. But being in responsible charge of geological work is not specifically or automatically equated with an individual's own personal engagement in geologic practice and may include the supervision of geologic work. Section 7805 provides:

"The term "responsible charge of work" means the independent control and direction by the use of initiative, skill and independent judgment of geological or geophysical work *or the supervision of such work.*" (Emphasis added.)

4 For purposes of the present inquiry, it is assumed that use of restricted titles and claims or representation of being registered as a geologist is not at issue. Clearly, the use of a restricted title would place an individual within the registration requirements of any geologic practice. However, the salient issue is whether or not certain geologic document review activities involve or constitute the practice geology for purposes of licensure.

Although unregistered subordinates placed in a “responsible position” may perform certain tasks and activities involved in geologic practice, ultimately this geologic work must be conducted under the responsible charge of a registered geologist. (§ 7837.)⁵

State Licensure Scheme: Board Regulations

The Board’s regulations also provide guidance in determining the types of activities requiring registration, or more precisely, which types of geologic activities constitute geologic work that is required to be conducted under the responsible charge of a registered geologist. Title 16, California Code of Regulations, section 3003(d), essentially defines professional geological work as the “application of scientific knowledge, principles and methods to geological problems through the *exercise of individual initiative and judgment* in investigating, measuring, interpreting and reporting on the physical phenomena of the earth.”⁶ The “practice of geology for others” is defined to include activities involving geologic *report and document preparation* and/or the *performance of geological services*, when the documents *are disseminated or made available to the public in such a manner that the public may reasonably be expected to rely thereon or be affected thereby*.⁷ However, the “review of geologic reports” is not specifically

⁵ A “subordinate” to a registered geologist is exempt from the Act; however, the exemption does not permit any such subordinate to practice geology for others in his own right or to use the title “registered geologist.”

⁶ Title 16, California Code of Regs. § 3003(d) provides:

“Professional geological work” is work performed at a professional level rather than at a subprofessional or apprentice level and requires the application of scientific knowledge, principles and methods to geological problems through the exercise of individual initiative and judgment in investigating, measuring, interpreting and reporting on the physical phenomena of the earth. Implicit in this definition is the recognition of professional responsibility and integrity and the acknowledgment of minimal supervision.

“Professional geological work” specifically does not include such routine activities as drafting, sampling, sample preparation, routine laboratory work, etc., where the elements of initiative, scientific judgment and decision making are lacking, nor does it include activities which do not use scientific methods to process and interpret geologic data. Further, it specifically does not include soils engineering, soils sampling, soils testing or other activities in or related to the agricultural application of soils sciences. It also does not include mining, mining engineering or other engineering disciplines and/or other physical sciences wherein geological investigation, analysis and interpretation are minimal or lacking.

⁷ The Board’s regulation in Title 16, California Code of Regulations, section 3003, subdivision (f), defines the “practice of geology for others” as follows:

“(1) The practice of geology or geophysics “for others” includes but is not limited to the *preparation of geologic or geophysical reports, documents or exhibits* by any commission, board, department, district or division of the state or any political subdivision thereof or of any county, city or other public body or by the employees or staff members of such commission, board, department, district or division of the state or any political subdivision thereof or of any county, city or other public body *when such reports, documents or exhibits are disseminated or made available to the public in such a manner that the public may reasonably be expected to rely thereon or be affected thereby*. (Emphasis added.)

“(2) The practice of geology or geophysics “for others” includes but is not limited to the *performance of*

included within the Board's regulatory definition. Consequently, as a matter of law, the review of geologic reports does not by itself, alone, fall within the restricted practice of geology.

Preliminary Considerations

The essential inquiry in the present case is to determine what precise geologic document review activities involve independent geologic decisions in the practice of geology. It is necessary to compare and contrast the unique facts of geologic document review work against the scope of the defined practice of geology as provided under the aforementioned statutes and the Board regulations.

Ultimately, the professional practice of geology involves a practitioner's independent control and direction by the use of initiative, skill and independent judgment, in the investigation and interpretation of geological features or the supervision of such projects. Consequently, the extent to which an individual in the geologic document review process exercises and uses "independent judgment" and is engaged in "professional geological work" related to the investigation or evaluation of geologic work shall determine whether such work or responsibility should be assigned to a registered geologist.

In evaluating whether a registered geologist is required for a particular task, it is important to take into consideration and determine the ultimate purpose of the "review function," as well as the intended use of the geologic work product resulting from the review. Policy and legal issues need to be taken into consideration. However, it is also important to note that the ultimate approval of geologic reports, plans, or other documents by governmental agencies

geological or geophysical services by any individual, firm, partnership, corporation or other association or by the employees or staff members thereof, whether or not the principal business of such organization is the practice of geology or geophysics, *when the* geological or geophysical reports, *documents* or exhibits *constituting the practice of geology* or geophysics *are disseminated or made available to the public* or any individual or combination of individuals other than the employees or staff of such organization *in such a manner that the public or said individual or combination of individuals may reasonably be expected to rely thereon or be affected thereby.* (Emphasis added.)

“(3) Geological or geophysical reports, documents or exhibits which are prepared by the employees or staff members of any individual, firm, partnership, corporation or other association or commission, board, department, district, or division of the state or any political subdivision thereof or of any county, city or other public body which are for use solely within such organization are considered "in-house" reports, documents or exhibits and are not the practice of geology or geophysics for others unless or until such reports are disseminated or made available as set forth in subsection (1) or (2).”

involves many considerations other than substantive geologic matters.⁸ In order to accomplish a variety of objectives, a document reviewer may engage in many activities which may include administrative/ministerial functions as well as reviewing and interpreting basic geologic data, checking for code compliance, checking for mathematical accuracy, and verifying the supporting documentation for geologic opinions and conclusions.

It may be argued that the Act restricts the practice of geology, including those aspects of geologic document review involving independent geologic determinations, to individuals registered as geologists and to those individuals working under the supervision of a registered geologist. The review of geologic reports and documents may often necessitate the use of

⁸ It must be acknowledged that it is only the geologic professional duties or activities of a person which are required to be conducted by or under the supervision of a registered geologist. The Board's regulations specifically provide examples of nonprofessional work (routine activities as drafting, sampling, sample preparation, routine laboratory work, soil testing, ... etc.) where the elements of initiative, scientific judgment and decision making are lacking. Title 16, California Code of Regs., § 3003(d).)

It may be argued that if the review and approval of geologic reports primarily involves "ministerial" code compliance, then said review does not contain the element of being in responsible charge of professional geologic work. It is our understanding that some persons working as "plan or report checkers" in some jurisdictions may only review and approve geologic reports or plans strictly for simple code compliance, format or even style. Simple code compliance relates to the process of comparing the plans, specifications and calculations with *clearly* mandated code requirements and determining if the plans comply therewith. This type of review is strictly *ministerial* and non-discretionary in nature and does not constitute the practice geology. However, a "ministerial" duty is generally "a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist." (Black's Law Dictionary, Revised Fourth Edition (1968).) In contrast, a duty, which is "discretionary" in nature, is one, which involves the exercise of judgment. A "discretionary act," as distinguished from a ministerial act, has been described as follows:

"Where the law prescribes and defines the duties to be performed with such precision and certainty *as to leave nothing to the exercise of discretion or judgment*, the act is ministerial, but where the act to be done involves the exercise of discretion and judgment it is not to be deemed merely ministerial." (*Elder v. Anderson* (1962) 205 Cal.App.2d 326, emphasis added.)

Ministerial functions are only those functions legally defined with such "precision and certainty as to leave nothing to the exercise of discretion or judgment." Under these very limited circumstances, we do not believe that a person providing *solely* ministerial and non-geologic functions requires registration as a geologist. However, the exercise of professional discretion and independent geologic judgment involved in the report review are acts requiring registration.

The ministerial review of geologic reports or other documents, which does not require independent scientific judgment, does not involve the practice of geology. For instance, ordinance, statute, regulation or other law may limit a governmental entity's discretion in evaluating or approving geologic reports. If a geologic report meets those minimum applicable legal requirements, existing law may require approval, even though the reviewer determines that it is not adequate in all other respects. In such a situation, the document reviewer would have no discretion to disapprove the report.

While some document review is simply ministerial in nature, often times geologic document review involves the review, revision, and approval of geologic work product whose preparation requires the use of geologic initiative, skill and independent judgment. It is also our understanding that the Board currently recognizes that experience gained in geologic document review, which involves geologic judgment, qualifies as experience for purposes of considering the issuance of a registration.

geological initiative, skill and independent judgment. If a particular geologic report requires an independent professional review as a condition precedent to taking some formal regulatory action, it follows that the review should be accomplished by a person in a responsible position and ultimately under the charge of a registered geologist. Also, it may be argued that the work product that results from an independent substantive review reflects the practice of geology when the work product is widely disseminated or made available to the public in such a manner that it can be reasonably expected to be relied on by the public.

If a document reviewer's activities involve being in "responsible charge" of discretionary decisions concerning geologic practice as defined above, such geologic work should be performed or supervised by a registered geologist. Determining whether a geologist is in "responsible charge" will depend on whether there is evidence that the individual exercises individual initiative, skill and judgment in providing geologic opinions, conclusions or reports on geologic matters. However, an unregistered person may be in a "responsible position" and provide nonministerial substantive geologic determinations so long as he or she is a subordinate employee to the registered geologist.⁹

If a geologic document review results in a written report revealing independent actual geologic decisions concerning permanent or temporary work that would create a hazard to life, health, property or public welfare, such decisions should be made under responsible charge of a registered geologist. The ultimate factual consideration is whether a final document or report resulting from a review of a geologic report details or evidences the independent geologic decisions of the document reviewer. If so, the geologic review and documentation resulting from that review likely constitutes the practice of geology. Such geologic practice necessitates the employment of a registered geologist to conduct or supervise the review of such reports.

Geologic Reports

The Act mandates that final geologic reports are to be prepared by persons appropriately registered. (§§ 7830, 7831 and 7835.) In relevant part, section 7835 mandates geologic reports to be prepared by, or under the direction, of a registered geologist as follows:

"All geologic plans, specifications, reports or documents shall be prepared by a registered geologist, or registered certified specialty geologist, or by a subordinate employee under his direction. In addition, they shall be signed by such registered geologist, or registered certified specialty geologist or stamped with his seal, either of which shall indicate his responsibility for them."

⁹ "Responsible Position" means a position whereby a person having individual control and direction of a geological project exercises individual initiative, skill and judgment in the investigation and interpretation of geological features, or the supervision of such projects. An individual can be considered to be in a responsible position even though not registered and working as a subordinate employee to a registered or qualified geologist. (Title 16, California Code of Regs. § 3003(c).)

The extent to which a document resulting from the review of a geologic report constitutes an "geologic report" will determine whether section 7830, 7831 or 7835 are applicable and whether said report is required to be prepared under the responsible charge of a registered geologist. Under both the statutes and regulations, there is no working definition as to what constitutes a "geologic report" that is required to be made under the responsible charge of a registered geologist. However, a person is deemed to engage in the practice of geology when he or she is in **responsible charge** of geologic work. (§ 7805.) Consequently, determining whether a geologic document review report constitutes a "geologic report" will be dependent on the extent to which a final geologic document review report manifests and documents the geologic decisions embodied within the report or final document.

The language of the Act indicates that the preparation of "geologic reports" be conducted under the responsible charge of a geologist registered with the Board. A geologic document review report may be characterized as a geologic report insofar as it evidences independent control and direction in the use of initiative, skill and independent judgment, regarding geologic decisions. Geologic decisions must involve "geology," "that science which treats of the earth in general; investigation of the earth's crust and the rocks and other materials which compose it; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for the benefit of mankind." (§ 7802.) Consequently, it follows that *if* a geologic document review report manifests evidence of independent control and direction in the use of initiative, skill and independent judgment regarding geologic decisions, it should be prepared under the responsible charge of a registered geologist.

Summary

It is not possible to state without substantial qualification or reservation that, as a matter of law, the substantive review of geologic reports involves the professional practice of geology requiring licensure. Nevertheless, geologic work involving the exercise of discretion and judgment should be conducted under the responsible charge of a registered geologist. If the review of a geologic report includes functions or activities that are more than "ministerial," involve actual geologic decisions and culminates in the preparation of a "geologic report," such a review likely constitutes the "practice of geology for others." Consequently, the preparation of such a "geologic report" should be conducted or supervised by a registered geologist.

A detailed review of the applicable laws and unique facts of each case is necessary when analyzing any specific case or factual scenario. It is also important to note that the ultimate approval of geologic plans by governmental agencies involves many considerations other than geologic matters. A public agency's discretion may be limited by ordinance, code or other law related to the specific regulatory authority of the agency.

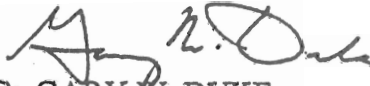
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A more specific definition regarding the type of geologic document review activities involve the practice of geology may be an appropriate topic for legislative or regulatory consideration since the provisions of the Act do not specifically address regulatory and other public policy issues involved in the final approval of geologic reports submitted to public agencies.

We trust that the foregoing will be of assistance.

Sincerely,

DERRY L. KNIGHT
Deputy Director
Legal Affairs


By GARY W. DUKE
Staff Counsel

CC: Paul Sweeney,
Seena Hoose,
Kathleen Hamilton.

BILL NUMBER: SCR 45 CHAPTERED 09/09/94
BILL TEXT

RESOLUTION CHAPTER 132
FILED WITH SECRETARY OF STATE SEPTEMBER 9, 1994
ADOPTED IN SENATE AUGUST 27, 1994
ADOPTED IN ASSEMBLY AUGUST 23, 1994
AMENDED IN ASSEMBLY AUGUST 19, 1994
AMENDED IN ASSEMBLY AUGUST 8, 1994
AMENDED IN ASSEMBLY JUNE 29, 1994

INTRODUCED BY Senator Rogers

APRIL 7, 1994

Senate Concurrent Resolution No. 45 Relative to engineering geologists.

LEGISLATIVE COUNSEL'S DIGEST

SCR 45, Rogers. Engineering geologists.

This measure would request the State Personnel Board and the Department of Personnel Administration to review the civil service classification for engineering geologists to ensure that these positions are used in compliance with the Geologist and Geophysicist Act, and to report to the Legislature within 180 days of the adoption of this measure.

WHEREAS, It is the intent of the Legislature to safeguard the life, health, property, public welfare, and the environment of the citizens of the state; and

WHEREAS, To that end the state employs in numerous agencies engineering geologists, as defined in the Geologist and Geophysicist Act (Chapter 12.5 (commencing with Section 7800) of Division 3 of the Business and Professions Code); and

WHEREAS, Existing law requires any person who uses the title

"registered geologist," "registered certified specialty geologist," or who stamps or seals any plans, specifications, plats, reports, or other documents with the seal of an engineering geologist, to be registered or registered and certified in accordance with the Geologist and Geophysicist Act; and

WHEREAS, It is the intent of the Legislature that the certification requirements that are imposed upon private sector professional engineering geologists and engineering geology partnerships, firms, or corporations shall also be imposed upon the state, and that any city, county, or city and county engaged in the practice of hiring engineering geologists shall also adhere to those requirements; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the Legislature requests that the State Personnel Board and the Department of Personnel Administration review the civil service classification for engineering geologists to ensure that these positions are used in compliance with Chapter 12.5 (commencing with Section 7800) of Division 3 of the Business and Professions Code, relating to geologists and geophysicists, and to report to the Legislature thereon within 180 days of the adoption of this measure; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the Director of the Department of Personnel Administration and to each member of the State Personnel Board.